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Supreme Court of the United States

OCTOBER TERM, 1944

No. 1183

ANNIE NORTON, TRUSTEE,
Petitioner and Appellant below,

v.

TOM GREEN COUNTY,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AND BRIEF IN SUPPORT THEREOF.

SCOTT SNODGRASS,
San Angelo, Texas.
W. P. DUMAS,
JOHN D. MCCALL,
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TOM GREEN COUNTY,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

This is a declaratory judgment suit by Petitioner against Respondent for a judgment declaring invalid a call of certain bonds prior to maturity. Petitioner has been denied relief by the court of last resort of the State of Texas.

While the amount of loss which Petitioner will suffer as a result of the particular bonds which are included in this action is not great, the decision of the Texas court will cause losses amounting to many million dollars to holders of Texas County bonds residing throughout the United States.

The facts are not in dispute, and briefly stated they are as follows:

In 1927, Respondent, Tom Green County, issued $297,000.00 of courthouse bonds, maturing serially each year to 1967. (R. 40.) Neither the bonds nor the proceedings authorizing their issuance provided that the bonds would be redeemable prior to maturity.

The bonds were sold for par and a premium of $12,178.00, and would not have brought a premium if any such option of prior redemption had been provided. (R. 31, Pars. 4 and 7.)

In 1938 and 1939, Petitioner purchased $5,000.00 of these bonds from a Dallas bank at par plus a premium of $1,147.37. (R. 31, Par. 8.)

On December 15, 1942, Respondent made a contract with B. V. Christie & Co., a bond dealer, whereby Christie agreed to assist the Respondent in "making the bonds available for refunding" into bonds bearing a lower rate of interest. (R. 84; 32; Par. 10.)

On July 12, 1943, the Governing Body of Respondent County passed an order calling the bonds at par on October 10, 1943, and declaring that interest would not be paid

on the bonds after October 10, 1943. (R. 32, Par. 11.) The value of Petitioner's bonds on that date was par plus $1,020.00. (R. 32, Par. 13.)

The Respondent did not put money of its own at the place of payment, because it did not have the money. (R. 32, Par. 12.) Nor did Respondent borrow money for the purpose. So the bonds were not in fact to be paid. They were to be purchased by Christie, with Christie's money, (R. 32, Par. 12) and he would make them "available" for exchange for refunding, as his contract says, and under the conditions therein prescribed. (R. 32, Par. 12.) The Attorney General of Texas, in an opinion to Respondent County concerning this very contract, held that the bonds thus purchased by Christie would become Christie's bonds. The Attorney General's opinion will appear herein as an appendix to the brief.

JURISDICTIONAL STATEMENT

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because Petitioner has a title and right specially set up and claimed by her under Article XIV, and Article I, Section 10 of the Federal Constitution, as shown by the questions presented below.

The District Court of Tom Green County, in which this suit was instituted, denied Petitioner the relief sought by her, saying "That this court is without any authority to grant plaintiff any relief, although she will be greatly damaged by the action of the Defendant County in calling said bonds".

The Court of Civil Appeals affirmed the District Court, and made the same comment. (Opinion, R. 110.)

Petitioners thereafter filed with the Supreme Court of Texas a Petition for Writ of Error to review the decision of the Court of Civil Appeals, and such petition was refused. Petitioner then filed with the Supreme Court of Texas, a Motion for Rehearing of said Petition for Writ of Error. This motion was overruled on January 10, 1945. (R. 134.)

QUESTIONS PRESENTED

The questions herein presented are:

1. Was the action of the governing body of Respondent County in purporting to call the bonds for redemption, and stopping interest thereon, actually a call for redemption, or was it a means to coerce Petitioner and other bondholders to sell their bonds to B. V. Christie & Co., thus depriving Petitioner of her property without due process of law in violation of Art. XIV of the Federal Constitution?

2. Was the action of the governing body of Respondent County in passing an order purporting to call the bonds and stopping interest thereon, a legislative act in violation of the Contract Clause of the Federal Constitution? Art. I, Section 10.

These questions were presented in the points assigned in the original brief in the Court of Civil Appeals (R. 105, Points 4 and 6); the motion for rehearing in that court (R. 112, Assignments IV and VI); the Petition to the Supreme Court of Texas for Writ of Error (R. 115,

Points 4 and 6); and in the Motion for Rehearing in the Supreme Court (R. 127, Points 1 and 5).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Texas court has decided the above Federal questions of substance which have not heretofore been decided by the Supreme Court, and in a way not in harmony with prior decisions of this court.

2. Under the holding of the court below, citizens throughout the United States, who hold millions of dollars of Texas County bonds, will be deprived of the premium cost and value of their bonds (often in excess of 25% of the principal of the bonds) for the profit of those bond speculators who have no obligation to regard the rights of bondholders.

PRAYER

Wherefore, your Petitioner prays that a Writ of Certiorari issue under the seal of this court, directed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, sitting at Austin, Texas, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Court of Civil Appeals had in the case numbered and entitled on its docket, No. 9453, *Annie Norton, Trustee, Appellant, v. Tom Green County, Appellee*, to the end that this cause may be reviewed and determined by this court as provided by the Statutes of the United States; and that the judgment herein of said Court of Civil Appeals be reversed by

this court, and for such further relief as to this court may seem proper.

Dated: April 16, 1945.

Respectfully submitted,

SCOTT SNODGRASS,
W. P. DUMAS,
JOHN D. MCCALL,
CLARENCE E. CROWE,
MILLARD PARKHURST,

By John D. McCall
Counsel for Petitioner.

(The time for filing this Petition was extended to April 30, 1945, by an Order entered April 4, 1945, by Mr. Justice Black.)

Supreme Court of the United States
OCTOBER TERM, 1944

No.....

ANNIE NORTON, TRUSTEE,
Petitioner and Appellant below,

v.

TOM GREEN COUNTY,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals (R. 106) is reported in 182 S. W. (2d) 849.

JURISDICTION

1. The date of the order of the Supreme Court of Texas overruling the motion for rehearing on the Petition for Writ of Error was January 10, 1945. (R. 134.)

The Court of Civil Appeals affirmed the trial court judgment on October 4, 1944; it overruled the motion for rehearing on October 25, 1944. The Supreme Court of Texas refused to grant the Writ of Error on December 19, 1944, and overruled the motion for rehearing on January 10, 1945.

2. The statutory provision which is believed to sustain the jurisdiction of this court is Title 28, *U. S. C.*, Section 344(b).

3. Petitioner purchased $5,000.00 of bonds issued by Respondent at par plus a premium of $1,147.37. (R. 31, Par. 8.) At the time of the purported call date her bonds were worth par plus $1,020.00. (R. 32, Par. 13.) The purported call provides that Petitioner is to be paid only par for the bonds, and that no interest is to be paid after the call date. (R. 32, Par. 11.)

Actually this purported call is not a call for payment, the bonds are to be taken up by B. V. Christie, & Co., and paid for by B. V. Christie & Co. money. (R. 32, Par. 12.)

The action of the governing body of Respondent violates the Federal Constitution in two respects: (a) Deprives Petitioner of her property without due process of law; and (b) It is an act of legislation impairing the obligation of a preëxisting contract. All of which is more fully developed in the argument.

4. The cases believed to sustain said jurisdiction are as follows:

Murray v. Charleston, 96 U. S. 432; 24 L. Ed. 760;

State of Louisiana ex rel. Elliott v. Jumel, 107 U. S. 711; 27 L. Ed. 448;

Northern Ohio Traction and Light Company v. State of Ohio ex rel. Pontius, 245 U. S. 574; 62 L. Ed. 481;

Ohio Life Insurance and Trust Company v. Debolt, 57 U. S. 416; 14 L. Ed. 997.

STATEMENT OF THE CASE

This has been stated in the preceding petition, which we adopt for this brief.

SPECIFICATION OF ERROR

The Court of Civil Appeals erred in affirming the judgment of the trial court and holding that the order passed by the governing body of Respondent County purporting to call said bonds, to be taken up by B. V. Christie & Co., and stopping interest on said bonds was a valid order.

ARGUMENT

SUMMARY OF ARGUMENT

POINT A

The order passed by the governing body of Respondent County should be declared to be invalid because it is an act of legislation impairing the obligation of the bond contract between Respondent and Petitioner.

POINT B

The order passed by the governing body of Respondent County should be declared to be invalid and not binding on Petitioner because it is not in fact a call of the bonds for payment, but is an attempt to deprive Petitioner of her property without due process of law by coercing her to sell her bonds to B. V. Christie & Co., and at a price substantially less than their value.

POINT A—(Restated)

The order passed by the governing body of Respondent County should be declared to be invalid because it is an act of legislation impairing the obligation of the bond contract between Respondent and Petitioner.

In 1927, the Respondent County sold the bonds with the express understanding and representation that they would be non-optional bonds, (R. 31, Pars. 6 and 7) and received $12,178.00 premium by reason of the non-option feature. (R. 32, Par. 9.)

In the bonds thus issued and sold in 1927, Respondent contracted to pay 5% interest on each bond to its maturity date. Such contract was not limited, qualified or contingent. (R. 30, Pars. 1 and 2.)

On July 12, 1943, the governing body of Respondent County passed an order calling said bonds and stopping payment of interest on October 10, 1943.

The call order just mentioned is asserted by Respondent to be under authority of Article 720, *Revised Civil Statutes of Texas,* which is as follows:

> "Art. 720.
>
> "All bonds issued under this chapter shall run not exceeding forty years, and *may* be redeemable at the pleasure of the county at any time after five years after the issuance of the bonds, or after any period not exceeding ten years, which may be fixed by the Commissioners' Court. Acts 1893, p. 112; G. L. vol. 10, p. 542."

Article 720 was enacted in 1893, but it was not self-executing in that:

(a) It does not fix a call price, or prescribe a rule by which the call price is to be determined. In this connection we wish to point out that not all callable bonds are callable at par and accrued interest. For example: City of Atlanta, Texas, bonds issued in 1936, redeemable within ten years at 2% premium; City of San Antonio Revenue Bonds of 1942, certain bonds are redeemable at a premium of ¼% for each year of the unexpired term, not exceeding 5%; Wichita Falls Refunding Bonds of 1940, part of issue redeemable after 1950 at 2½% premium; Pharr-San Juan Independent School District Bonds of 1942, redeemable in 1943 at 5% premium reducing so much each year to a minimum of ½%; Donna Independent School District Bonds of 1943, similar to Pharr-San Juan Bonds; City of Teague Electric System Revenue Refunding Bonds of 1939 redeemable at a top premium of 8.20%; Brown County Water Improvement District Bonds of 1941, redeemable after 1950 at a premium of 2½%.

(b) It does not prescribe the method of giving the notice of call. This is vital to an effective call because the bonds are payable to bearer, are negotiable, and frequently scatter into most of the United States.

(c) The italicized word "may" was substituted for the word "shall" by the legislature in 1925, prior to the issuance of these bonds. Although the court below in this case and the Texas Supreme Court, in Cochran County v. Mann, 172 S. W. (2d) 689, ruled, without explanation, that the change made no difference in the meaning of the Act, it does show that the Act was not intended to be self-executing.

In *Murray v. Charleston* (1887), 96 U. S. 432; 24 L. Ed. 760, the City of Charleston had issued some securities bearing 6% interest. Thereafter the city levied an annual tax

of 2% upon these bonds. The levy was upheld by the Supreme Court of South Carolina. The Supreme Court of the United States took jurisdiction of the case solely on the ground that a federal question was presented, and reversed the case on the ground that the tax ordinance was *legislation* impairing the obligation of the contract, *notwithstanding the fact that the tax was levied under a city charter provision authorizing such tax, which was in effect at the time the securities were issued.*

Also see *Hartman v. Greenhow*, 102 U. S. 672; 26 L. Ed. 271; *Vicksburg v. Waterworks Company*, 202 U. S. 453.

By analogy the Commissioners' Court, by its attempted act of legislation, has no more right to cancel all of the County's interest on these bonds than did the City of Charleston to cancel one-third of the interest on its debt.

POINT B—(Restated)

The order passed by the governing body of Respondent County should be declared to be invalid and not binding on Petitioner because it is not in fact a call of the bonds for payment, but is an attempt to deprive Petitioner of her property without due process of law by coercing her to sell her bonds to B. V. Christie & Co., and at a price substantially less than their value.

Neither the bonds nor the proceedings say that the bonds can be called for payment prior to their maturity.

The governing body of Respondent County passed an order calling the bonds for payment on October 10, 1943, under Article 720, *Revised Civil Statutes of Texas*, and de-

claring that no interest will be paid on the bonds after that date. Actually Respondent is not going to pay them. Petitioner and the other bondholders must sell their bonds to B. V. Christie & Co., at par, (about 20% below their actual value) or else hold a non-interest bearing obligation.

The bonds thus become the property of Christie. See Attorney General's opinion in appendix hereto.

It is true that Christie is obligated under his contract to surrender the bonds thus purchased by him for new refunding bonds bearing a lower rate of interest, but certain legal procedure must be followed for the issuance of refunding bonds. The governing body of respondent must pass an order authorizing their issuance. The bonds cannot be issued unless approved by the Attorney General of Texas. (Art. 715.) The Attorney General requires a certified copy of the order and certain other certificates including evidence that not less than 80% of the original bonds have been committed to the refunding, before he will approve the bonds.

Christie's contract to take the Refunding Bonds is conditioned upon the unqualified opinion of the Attorney General and recognized municipal bond attorneys of his selection. The conditions are reasonable and customary, but irregularities can and do happen to prevent such approvals. If such irregularities were not possible, then there would be no reason to require such approvals. It is the duty of approving attorneys to require certain provisions, recitals and certificates in order to safeguard the investment for the many years it has to run. Sometimes municipal officials decline to comply with such requirements.

If, for some reason, Respondent did not or could not issue approvable refunding bonds, Christie would be in the enviable position of having purchased the original bonds at par, and having a quick market for them at par plus 10% to 25%, or more.

We do not mean to imply that B. V. Christie & Co., or counsel of their selection, would purposely do anything to prevent final delivery of the bonds. We say this not only because there is no evidence of such intention in this case, but also because of the ill effect such practice might have upon their additional business in this now very lucrative field which has arisen since the decision in *Cochran County v. Mann*, 172 S. W. (2d) 689.

If the refunding is completed, Christie gets 10% of the saving Respondent makes in interest (Contract R. 84). What is even better, he gets the $219,000.00 of refunding bonds bearing 3½% interest, maturing serially to 1960. His profit on these refunding bonds will be substantial.

Respondent relies on *Dallas County v. Lockhart*, 96 S. W. (2d) 60. The bonds involved in that case contained a call provision on their faces and there was no evidence in that case or reason to believe that they could be worth more than par. Nor was this constitutional question raised in that case.

The injustice in this and similar situations arose because no one believed that Article 720, *Revised Civil Statutes*, applied to serial county bonds. (R. 31, Pars. 6 and 9.) The Attorney General, for at least twenty years, has held Article 720 not applicable to county bonds voted to

mature serially. (R. 51; 58; 62; 72.) The Supreme Court of Texas, however, has held that county bonds can be called for redemption under Article 720 even though such right was not mentioned in the bonds. (*Cochran County v. Mann, supra.*)

In this case the court went a step further and held that under this article the county could coerce its bondholders to sell their bonds to a dealer selected by the county and having no privity with the bondholders, even though the county had obtained a $12,000.00 premium on the strength of their being non-callable bonds.

CONCLUSION

The Court of Civil Appeals, in closing its opinion said (R. 110):

> "The final conclusion of law of the trial court reads: 'That this court is without any authority to grant plaintiff any relief, although she will be greatly damaged by the action of the defendant County in calling said bonds.' In this conclusion we concur."

We feel that the court took too narrow a view of its authority. Here the court recognized that petitioner was about to be greatly damaged; that the respondent had enriched itself $12,178.00, but held that it was powerless to prevent the wrong.

Justice Cardozo, writing in "*The Growth of the Law*", had this to say concerning such situations:

> "Judges march at time to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it, none the less, with averted gaze

convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the gods of jurisprudence on the altar of regularity."

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

SCOTT SNODGRASS,
W. P. DUMAS,
JOHN D. MCCALL,
CLARENCE E. CROWE,
MILLARD PARKHURST,

By John D. McCall
Counsel for Petitioner.

APPENDIX

OFFICE OF ATTORNEY GENERAL OF TEXAS
AUSTIN

November 15, 1944

Honorable R. L. Armstrong
County Auditor
Tom Green County
San Angelo, Texas

Opinion Number 0-5019

Re: 1. Has the Commissioners' Court of Tom Green County authority to enter into contract with B. V. Christie and Company in connection with proposed plan of refunding courthouse bonds?

2. Does the court have authority to pay the fees or commissions called for therein out of the sinking fund of these courthouse bonds?

Dear Sir:

Replying to your inquiry, we think your first question is answered in our Opinion 0-1291, a copy of which is enclosed herewith. We think there can be no doubt about the authority of the Commissioners' Court to employ experts to render valuable service which will result in substantial saving to the county.

Replying to your second question, as to the authority of the Commissioners' Court to pay the fees or commissions called for in the contract, out of the sinking fund of the courthouse bonds, we call your attention to the case of Elser v. City of Ft. Worth, 27 S. W. 739-741, in which the court

held that the test of the legality of a particular use of a sinking fund is whether or not "the fund is being used for the purpose of ultimately accomplishing that result (the final redemption of the bonds) and is not being diverted from the main object of its creation. In that case the court held that the drawing of a draft to buy securities as an investment of a sinking fund was a draft drawn to redeem the bonds, inasmuch as it was a step toward the final redemption of the bonds.

It is a step toward the final redemption of these bonds, if the county can, by paying $1.00 today, save $10.00 in future interest costs on these bonds. Under the proposed plan of refunding these 5% bonds by the issuance of refunding bonds bearing 3½% interest, the county will reduce its obligation by something like $60,000 at a cost to the county of approximately $6,000. In our opinion the use of the sinking fund for accomplishing this result is not a diversion from the main object for which the fund was created but is wholly consistent therewith.

In a recent case by the Kentucky Court of Appeals, the Governor v. Wolfe County, 163 S. W. (2d) 485, the court holds that the county "could legally contract with some agency to bring together the bondholders and persuade them to exchange their five per cent bonds for others bearing a less rate, and running over a longer period, and to pay the agency to 'prepare and file application for approval' of a refunding plan; work out plans, 'to prepare and deliver all legal papers necessary for the consummation of the plans,' the fee for the services to be paid from the road and bridge sinking fund, and not here from the proceeds of sale, since the plan provides for no sale."

In the contract submitted by you, it appears that in order to make the bonds available for refunding, *Christie & Company will have to acquire the outstanding bonds and hence will be the bondholders**, for whose benefit the sinking fund was created, and will exchange the old bonds for the refunding bonds with full knowledge that the sinking fund

---

* Italics ours.

has been used in part to make the refunding possible, thereby consenting to the use of these funds for that purpose.

In our opinion Number 0-3320, a copy of which opinion is enclosed herewith, we held that the Board of County and District Road Indebtedness has ample authority to pay a premium for eligible road bonds and to use the sinking funds of counties deposited with the Board to retire such bonds, in payment of such premium. We based our conclusion in Opinion 0-3320 on provisions of subsection (m) of Section 6 of House Bill 688 passed by the 46th Legislature, Regular Session, 1939. This Act does not expressly authorize the payment of a premium out of these funds, but is implied from the authority granted to purchase the bonds prior to maturity. In other words, the use of these funds for that purpose is in keeping with the purpose for which the fund was created, namely, the ultimate redemption of the bonds. Your second question is, therefore, answered in the affirmative.

Yours very truly,

ATTORNEY GENERAL OF TEXAS,

By (s) C. F. GIBSON,
Assistant.

CFG:ff
Encl.

APPROVED JAN. 9, 1943
(s) Gerald C. Mann
Attorney General of Texas

APPROVED
Opinion Committee
By B.W.B. Chairman

No. 1183

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TOM GREEN COUNTY, TEXAS,
Respondent and Appellee Below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT.

REPLY BRIEF FOR RESPONDENT

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San Angelo, Texas.
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Attorneys for Respondent.

YOUNG CO., HOUSTON

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No. 1183

Supreme Court of the United States

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ANNIE NORTON, TRUSTEE,
Petitioner and Appellant Below,

v.

TOM GREEN COUNTY, TEXAS,
Respondent and Appellee Below.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT.

REPLY BRIEF FOR RESPONDENT

Opinion Of The Court Below.

The opinion of the Court of Civil Appeals (R. 106) is reported in 182 S.W.2d 849, *et sequente.*

Jurisdiction.

Petitioner attempts to invoke the jurisdiction of this court under Section 344(b), Title 28, U. S. C.,

upon the grounds that respondent's act in calling petitioner's bonds for redemption (a) impairs the obligation of a pre-existing contract and (b) deprives petitioner of her property without due process of law. Respondent says that, under its previous decisions, this court has no jurisdiction to review the judgment of the State court for the reasons which follow:

1. The State court has not given effect to a legislative act whch was enacted subsequent to the creation of the contract and no Federal question is presented under the "contract clause" of Article I, Section 10 of the United States Constitution. *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 30, 31 L. Ed. 607, 612; *Bacon v. Texas,* 163 U. S. 207, 216, 41 L. Ed. 132, 136; *Tidal Oil Co. v. Flanagan,* 263 U. S. 444, 68 L. Ed. 382, 386. The only legislative Act which was considered by the State court was Article 720, R. C. S. 1925, which was in effect at the time the bonds were issued.
2. The order of the Commissioners' Court of Tom Green County (R. 25) exercising the option to redeem the courthouse bonds was not a legislative Act. It does not purport to endow the county with new powers or authority which would be characteristic of a legislative Act but by its express terms it exercises "the option granted by Article 720, Revised Civil Statutes of Texas, 1925, to redeem all bonds of the above described issue now outstanding" (R. 26, 27), which is nothing more than a ministerial act

executing the provisions of the pre-existing Article 720. It does not grant a new right to respondent but exercises an existing one. It does not bear the marks of a legislative Act nor does the Commissioners' Court possess, or claim to possess, legislative power to enact a new law relating to the subject matter.

3. No impairment is shown nor has petitioner been deprived of her property. If petitioner's erroneous construction of Article 720 is accepted for the purpose of this argument, the order calling the bonds for redemption and giving notice that interest will not be paid on the bonds after the date of call, is, at most, a *breach* of contract or, more properly, evidence of an intention to breach the contract in the future. The breach of a contract presents no Federal question under either the contract clause or the due process clause. *McCormick v. Oklahoma City,* 236 U. S. 657, 59 L. Ed. 771; *St. Paul Gaslight Co. v. St. Paul,* 181 U. S. 142, 45 L. Ed. 788; *Manila Inv. Co. v. Trammell,* 239 U. S. 31, 32, 60 L. Ed. 129, 130. Petitioner's only injury, if any, resulting from the Commissioners' Court order of which she complains, is that future interest will not be paid on her bonds. If the order is void, as she contends, she may have her day in court when the interest is not paid when allegedly due; if valid, she has not been injured.

4. The order complained of does not "coerce" petitioner to sell her bonds to B. V. Christie & Com-

pany. By its terms, she may keep her bonds or present them for redemption as she chooses. If the Commissioners' Court had no authority to call the bonds for redemption, its efforts to do so are futile and petitioner may proceed in court to collect her interest when due. If that body had such authority, interest stopped on the day of call and petitioner may present her bonds now and collect the principal and accrued interest to October 10, 1943, which is all she is entitled to receive under the bond contract. The petition alleges neither a deprivation of property nor lack of due process of law.

This case is similar to that *Catholic Order of Foresters v. State,* 271 N. W. 670 (N. D. Sup. Ct.) in which this court denied the petition for writ of certiorari (301 U. S. 665, 81 L. Ed. 1331).

Statement of the Case.

Respondent notes the following inaccuracies in petitioner's statement of the case:

1. The statement that "the decision of the Texas court will cause losses amounting to many millions of dollars to holders of Texas County bonds residing throughout the United States" (Petition 2). There is no evidence in the record to sustain this statement and no "loss" to a bondholder is caused by the exercise of an option of redemption which was a part of the contract represented by the bonds at the time of their issuance.

2. The statement that "neither the bonds nor the proceedings authorizing their issuance provided that the bonds would be redeemable prior to maturity" (Petition 2). Article 720, Revised Civil Statutes of Texas, 1925, which was written into and became a part of the bonds and the proceedings authorizing their issuance, specifically provided for the right of redemption before maturity. All persons were charged with knowledge of the provisions of this statute.

3. The statement that "They (petitioner's bonds) were to be purchased by Christie, with Christie's money . . . . " (Petition 3). Christie did not agree to purchase petitioner's bonds but his contract with Tom Green County (R. 8 - Ex. C) gave him an option to purchase the refunding bonds which the county proposed to issue for the purpose of refunding, cancelling and in lieu of the original bonds which were to be redeemed. (R. 10.) This contract provided that "upon exercising our (Christie's) option of (to) purchase *the refunding bonds,* we agree to make available a sum equal to the principal amount of the bonds surrendered for exchange and the County agrees to make available sufficient funds to pay the accrued interest on such bonds to the date of exchange. The *refunding bonds* shall be delivered to us . . . . " (R. 10).

SUMMARY OF ARGUMENT

Counter Point A.

Petitioner's bonds were redeemable by the county under the provisions of Article 720, Revised Civil Statutes of

Texas, 1925, which was in effect when the bonds were issued and was written into and became a part of the bonds by operation of law. Petitioner was charged with knowledge of this statutory option when she purchased her bonds and the exercise of the option constitutes an enforcement of the contract—not an impairment of its obligation. (In answer to Petitioner's Point A.)

Counter Point A(1).

The order passed by the governing body of Respondent County exercising the option to redeem the bonds was a ministerial, and not a legislative, act. (In further answer to Petitioner's Point A.)

Counter Point B.

The method followed by Respondent County in redeeming and refunding its courthouse bonds is a valid and customary exercise of Respondent's right of redemption and does not deprive Petitioner of her bonds without due process of law nor does it coerce Petitioner to sell her bonds to B. V. Christie & Company.

Argument.

The Commissioners' Court of Tom Green County was without authority in June and July, 1927, when these bonds were issued, to issue courthouse bonds which were *non*-redeemable prior to maturity.

A county does not have inherent power to issue bonds but such power, if it exists, must be derived from appropriate constitutional or statutory authority. Where such power is granted and the legislature

prescribes the type and character of bonds to be issued, the governing body is powerless to issue bonds of a different type or character. *Robertson v. Breedlove,* 61 Tex. 316; *Ball v. Presidio County,* 88 Tex. 60, 29 S. W. 1042; *Lasater v. Lopez,* 110 Tex. 179, 217 S. W. 373; *Anthony v. Jasper County,* 101 U. S. 693, 25 L. Ed. 1005; *Ogden v. Daviess County,* 102 U. S. 623, 26 L. Ed. 263; *Barnam v. Town of Okolona,* 148 U. S. 393, 37 L. Ed. 495.

The statutes authorizing the issuance of bonds enter into and become a part of the bond contract as fully as if copied verbatim on the face of each bond and all persons are charged with knowledge thereof. *Cochran County v. Mann,* 141 Tex. 398, 172 S. W. (2) 689, 690; *Wood v. Lovett,* 313 U. S. 362, 85 L. Ed. 1404; *Home B. & L. Ass'n. v. Blaisdell,* 290 U. S. 398, 429, 78 L. Ed. 413, 423; *Anthony v. Jasper County,* 101 U. S. 693, 697, 25 L. Ed. 1005, 1008.

Petitioner's bonds recite upon their face that they were issued under Articles 701 to 725, inclusive, Revised Civil Statutes, 1925, (R. 11). Article 720 of this group of statutes reads as follows:

> "All bonds issued under this chapter shall run not exceeding forty years, and may be redeemable at the pleasure of the county at any time after five years after the issuance of the bonds, or after any period not exceeding ten years, which may be fixed by the commissioners court. Acts 1893, p. 1112; G. L. vol. 10, p. 542."

This statute was in effect when the bonds were issued and became a part of the bond contract. The

Supreme Court of Texas in *Dallas County v. Lockhart*, 96 S. W.2d. 60, 128 Tex. 50, (1936) held that, as to bonds issued under this statute, "the right of the county to redeem them is expressly reserved and conferred" by the statute. (p. 61). The court further held that the right of redemption might be exercised for the purpose of refunding the bonds at a lower rate of interest or, if funds sufficient to discharge them were available, the option might be exercised to retire the debt. The court said (p. 63): "The valuable right of redemption by refunding *conferred upon the county by the Legislature* is not subject to be defeated by the will of a bondholder."

In *Cochran County v. Mann*, 141 Tex. 398, 172 S. W.2d 689 (1943), the Supreme Court of Texas had before it the same basic question which is presented in this case, viz, whether bonds issued under Article 720 were redeemable perforce of the statute. The court said (p. 691):

> "As we construe the above statute, where bonds are issued under the chapter therein referred to, if the Commissioners' Court at the time the bonds are issued makes no provision concerning its right to redeem the bonds prior to their maturity, they may be redeemed at the pleasure of the county at any time after five years after the issuance thereof. However, the Commissioners' Court may, by an appropriate order entered at the time the bonds are issued, postpone the date after which the bonds may be redeemed to not exceeding ten years from the date of their issuance. The bonds are redeemable, in all events, at not exceeding ten years from the date of their

issuance. Dallas County v. Lockhart, State Treasurer, 128 Tex. 50, 96 S. W.2d 60."

This construction was affirmed in *Bexar County v. Sellers,* 142 Tex. 290, 178 S. W.2d 505 and again in *Jefferson County v. Sellers,* 142 Tex. 528, 180 S. W.2d 138 (four cases).

When respondent called its bonds for redemption, therefore, it was exercising an option which was a part of the bond contract from its inception. This was a ministerial, not a legislative, act. Petitioner knew, or was charged with knowing, that the bonds were redeemable by the county when she bought them. The exercise of the redemption privilege is an enforcement of the contract—not an impairment of its obligation.

The courts have given effect to similar statutory options fixed by the laws of other states. *Catholic Order of Foresters v. State,* 271 N. W. 670 (N. D. Sup. Ct.—Certiorari denied—301 U. S. 665, 81 L. Ed. 1331); *Dupont v. Mills,* 196 Atl. 168 (Del. Supt. Ct.); *Maricopa County v. Osborne,* 125 Pac.2d 703, 136 Pac.2d 270, (Ariz. Sup. Ct.); *Roberts & Co. v. Paducah,* 95 Fed. 62; *National Bank v. St. Joseph,* 31 Fed. 216; *Harmon County v. Edwards,* 282 Pac. 1090 (Okla. Sup. Ct.); *Neighbors of Woodcraft v. Rupert,* 4 Pac.2d 360 (Idaho Sup. Ct.); *Carlson v. Helena,* 102 Pac. 39 (Mont. Sup. Ct.).

Petitioner complains that the order of the Commissioners' Court of Tom Green County calling the bonds for redemption has the effect of forcing petitioner

to sell her bonds to B. V. Christie & Company. We confess that we are not clear as to petitioner's line of reasoning on this point but it appears that it would be applicable alike to bonds which are made optional by express language appearing on the face of the bonds as well as those which are made optional by the statute. The plan followed by respondent in contracting for the sale of its refunding bonds bearing a lower rate of interest and requiring the purchaser to provide the funds necessary to take up the bonds called for redemption, is a common practice made necessary by the laws of Texas relating to refunding and is universally and frequently practiced.

Articles 713 and 714, Revised Civil Statutes, 1925, provide that no refunding bonds shall be registered by the Comptroller of Public Acounts until the original bonds are presented for cancellation. When bonds are called for redemption, whether under a statutory or contractual option, it becomes necessary for the bonds to be taken up at the place where they are made payable and held until they can be presented to the Comptroller for cancellation, if it intended to refund them. In such cases, it is customary and necessary for the county or municipality to make arrangements with the purchasers of the refunding bonds to provide funds with which to take up the outstanding bonds which have been called for payment. A priori, the bonds must be taken up with funds belonging to third persons because (a) if the county used its own funds the debt would be merged in the debtor and discharged and there would be nothing to refund, and (b), if the

county or municipality had sufficient funds to retire the bonds, there would be no necessity to refund them.

The contract in *Dallas County v. Lockhart,* supra, was substantially identical with the contract in the case at bar. Of the former, the Texas Supreme Court said (p. 62): "'The transactions contemplated by the contract between the county and Donald O'Neil & Company are those of a commonly employed refunding operation. They come squarely within the terms of the statutes. In entering into that contract, the county was but exercising its statutory right to issue new bonds in lieu of the originals and bearing lower interest rates."

Further, as shown in our statement of the case, supra, respondent's contract with B. V. Christie & Company gave Christie an option (which was later exercised) to purchase the refunding bonds, not the original bonds, and petitioner is not obligated to sell her bonds to Christie or, for that matter, to the county. In exercising the option to redeem, the county merely accelerated the maturity of the bonds and relieved itself of the obligation to pay the higher rate of interest after the date of call. Petitioner is entitled to receive the principal of her bonds and interest accrued to the date fixed for redemption and, under the contract, that is all she was ever entitled to receive.

The use of Christie's funds to take up the called bonds is but a step toward the final purpose—the refunding of the bonds at a lower interest rate. In making such funds available, he is, in effect, making

payment on the refunding bonds which he has contracted to purchase. The contract at all times binds the parties to pursue the transaction to its ultimate and intended conclusion. Petitioner, however, has no interest or rights in the matter beyond the point where she receives the principal and accrued interest on her bonds. With that done, her contract has been fully satisfied.

Conclusion.

The petition for writ of certiorari should be dismissed or, in the alternative, denied.

Respectfully submitted,

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